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No. 93-320

In the Supreme Court of the United States

OCTOBER TERM, 1993

PAUL G. KEOUGH, ACTING REGIONAL ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, REGION 1,
Petitioner,

v.

AMERICAN POLICYHOLDERS INSURANCE COMPANY,
Respondent.

SUPPLEMENTAL MEMORANDUM OF RESPONDENT, AMERICAN POLICYHOLDERS INSURANCE COMPANY.

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SUPPLEMENTAL MEMORANDUM OF RESPONDENT, AMERICAN POLICYHOLDERS INSURANCE COMPANY.

Respondent American Policyholders Insurance Company ("API") submits this supplemental memorandum to respond to two issues raised for the first time in a reply brief recently filed by petitioner Paul G. Keough, Acting Regional Admini-

strator of the Environmental Protection Agency, Region 1 ("Mr. Keough").

On October 21, 1993, API submitted a memorandum suggesting that the issues presented by the instant petition for certiorari have been mooted by API's voluntary dismissal of its claims against Mr. Keough. This dismissal was effected in state court, where this case is presently pending after remand from the federal district court. API's memorandum further suggested that, in light of the dismissal, Mr. Keough's petition should be denied so that the state court proceedings may continue without further delay.

In response to API's suggestion of mootness, Mr. Keough filed a reply brief in which he (1) "infers" from API's voluntary dismissal of its claims that API does not intend to renew its claims against Mr. Keough or his successors at any time in the future, and (2) contends that this Court should grant the petition for certiorari, vacate the judgment of the court of appeals and direct that the district court dismiss API's claims with prejudice.

With respect to Mr. Keough's inference concerning API's future intentions, API initially made Mr. Keough's predecessor a party to this case based on an apparent requirement of Massachusetts law that "underlying claimants" such as Mr. Keough must be present in order for a state court to make a binding declaration with respect to insurance coverage. However, in light of Mr. Keough's strenuous efforts to extricate himself from the case, and the substantial delay and expense to API that resulted from those efforts, API decided to voluntarily dismiss Mr. Keough from the case and to attempt to persuade the state courts that, at least where the underlying claimant is a government official or government entity that resists participating in the declaratory judgment action on sovereign immunity grounds, the rule requiring the presence of the under-

lying claimant should be relaxed. In the event API's mission fails, and the state courts rule that, even in the circumstances of the instant case, the underlying claimant must be present, API may decide to renew its claims against Mr. Keough. API has preserved its right to do so by voluntarily dismissing its claim against Mr. Keough *without* prejudice through an appropriate state court procedure.

With respect to Mr. Keough's contention that the Court should grant the petition for certiorari in order to effect a dismissal of API's claims *with* prejudice, API submits that its claims against Mr. Keough have *already* been dismissed. The fundamental distinction between the situation here and the situations in *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), *Deakins* v. *Monaghan*, 484 U.S. 193 (1988), as well as in the other cases Mr. Keough cites in part I of his reply argument, is that in each of those cases, the parties were still properly before the Court at the time the issue of mootness was raised, albeit arguably with no justiciable case or controversy remaining between them. Here, in contrast, by virtue of API's dismissal of its claims against him, Mr. Keough simply is no longer a party to this case. Accordingly, there is no jurisdictional predicate upon which this Court may base

any further action in this matter beyond the denial of Mr. Keough's petition for certiorari.[1]

Respectfully submitted,

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December 13, 1993

[1] That Mr. Keough recognizes this fact is evidenced by his recent motion to stay the state court proceedings, including the state court's consideration of Mr. Keough's own motion to dismiss. Mr. Keough argued that such a stay was necessary because, in the absence of a "live" controversy between himself and API, the Supreme Court *could not consider* his petition for certiorari. The state court denied Mr. Keough's stay motion, after which API availed itself of the appropriate state court procedure to voluntarily dismiss its claims against Mr. Keough. Thus, just as surely as if Mr. Keough's motion to dismiss had been allowed, API's voluntary dismissal of its claims has eliminated any "live" case or controversy between itself and Mr. Keough.